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HIGH COURT OF JUDICATURE CHHATTISGARH: BILASPUR

Writ Petition (C) No. 173 of 2007

Petitioner : Mithlesh Kumar Patel S/o Jai Ram Patel,
aged about 52 years, Up-Sarpanch Village
Panchayat-Kulba, Block/Tah.- Raigarh, Dist-
Raigarh (C.G.)

Versus

Respondents : 1. State of C.G. through Secretary, Panchayat
and Social Welfare Department, Mantralay,
Raipur (C.G.)
2. District Collector, Raigarh, Dist-Raigarh
(C.G.)
3. Specified Officer/Sub Divisional Officer,
Raigarh, Dist-Raigarh (C.G.)
4. Presiding Officer/Naib Tahsildar, Raigarh,
Dist-Raigarh (C.G.)
5. Village-Panchayat, Kulba, through its
Secretary, Block-Raigarh, Dist-Raigarh (C.G.)
6. Vidyanand Patel, Removed Sarpanch,
Village-Panchayat, Kulba, Block/Dist-Raigarh
(C.G.)

Single Bench: Hon'ble Shri Justice Satish K. Agnihotri

Shri Manindra Shrivastava, Senior Advocate with Shri K.N. Nande,
Advocate for the petitioner.

Shri Utkarsh Verma, Dy. Govt. Advocate for the respondents No. 1 to
4/State.

Shri B.D. Guru, Advocate for the respondent No. 5.

Shri P. Diwakar, Senior Advocate with Shri R.S. Patel, Advocate for the
respondent No. 6.

ORDER

(Passed on this 25th June, 2007)

1. By the instant petition, filed under Article 226 of the Constitution of India,
the petitioner seeks following relief:-

"71. To call the entire records of the case and to peruse the
same.

7.2 May kindly be please to allowing the instant application for
staying of the operation and effect of the recount made by
the learned S.D.O. Raigarh in Rev. Case No. 10 E/121/06-

07 dt. 16.01.07 pursuant to order of the learned Collector passed in case no. 11/A-89/06-07 dt. 08.01.07.

7.3 To issue any other writ or directions or orders in favour of the petitioner and against the respondents in the interest of justice, equity and fair play.

7.4 To issue a writ in nature of mandamus or order of direction commanding respondents to be completed the proceeding of appointment of officiating Sarpanch and hand over the charge to him.

7.5 To award cost of this petition.

2. The indisputable facts, in nutshell, are that the petitioner is the elected Up-Sarpanch of the Gram Panchayat, Kulba, Block and District Raigarh. On the basis of complaint made against the respondent No. 6 i.e., elected Sarpanch of the Gram Panchayat, Kulba, no confidence motion was initiated and the meeting for the same was held on 28.11.2006 (Annexure P/1), whereunder the no confidence motion against the respondent No. 6 was passed by 12 votes in favour of the no-confidence motion, 2 votes against and 1 vote was declared as invalid. The Panchayat constituted of 15 members including Sarpanch and Up-Sarpanch. All the members participated in the meeting held for no confidence motion against the respondent No. 6. The Presiding Officer-cum-Naib Tahsildar vide letter dated 28.11.2006 (Annexure P/2) informed to the Prescribed Authority-cum-Sub-Divisional Officer (Revenue), Raigarh that all the 15 members participated in the proceedings, out of which 12 members cast their votes in favour of no confidence against the respondent No. 6, which is more than three-fourth of the total members present. Thus, the no confidence motion was accordingly passed. On the next date i.e., 29.11.2006 (Annexure P/3), the Sub Divisional Officer (Revenue), Raigarh (hereinafter

referred to as 'the S.D.O.') wrote to the Secretary, Gram Panchayat, Kulba for appointing officiating Sarpanch within a period of 15 days.

3. Being aggrieved, the respondent No. 6 made a reference on 4.12.2006 to the Collector, Raigarh under sub-section (4) of Section 21 of the Chhattisgarh Panchayat Raj Avam Gram Swaraj Adhiniyam, 1993 (hereinafter referred to as 'the Adhiniyam, 1993'). The Collector vide order dated 11.12.2006, stayed the subsequent action pursuant to the no confidence motion dated 28.11.2006. Thereafter, vide order dated 8.1.2007 (Annexure P/4), the Collector remitted back the matter to the S.D.O. for recounting of votes cast in no confidence motion, held on 28.11.2006. The S.D.O. recounted votes on 16.1.2007 (Annexure P/5) in presence of all the concerned and found that 10 votes were cast in favour of the no confidence motion, two votes were cast against the no confidence motion and 3 votes were found invalid. Thus on the basis of 10 votes, no confidence motion cannot be held as passed.
4. Being aggrieved, the petitioner has filed an instant petition seeking stay of the operation and effect of the recount done on 16.1.2007, pursuant to the order dated 8.1.2007 passed by the Collector, Raigarh.
5. Shri Manindra Shrivastava, learned Senior Advocate with Shri K.N. Nande, learned Advocate appearing for the petitioner would submit that under the provisions of Section 21 (4) of the Adhiniyam, 1993, the Collector alone is competent to examine the validity of the proceedings, but he has no power to direct recount of votes in respect of no confidence motion. It was further contended that the Collector in exercise of his power has acted beyond his competence by passing the order for recounting of votes. Recount of votes ought to have been done by the Presiding Officer/Naib Tahsildar, not by any other officer.

6. It was next contended that in the instant case, the Naib Tahsildar was not present at the time of recounting. The Collector alone is obliged to decide the dispute. He has no authority under the law to delegate such power and authority to any of his subordinates or any other authority. The direction of recount was passed without holding any trial, recording evidence and without deciding the dispute, which was the subject matter before him. The Collector has completely abdicated its power as an adjudicating authority under Section 21 (4) of the Adhiniyam, 1993. Thus, the order of the collector is illegal, void, ab-initio and non-est in the eye of law. Alternatively, it was submitted that the order of recounting on mere asking cannot be done without coming to the conclusion that recounting was necessary. The same has not been done in the instant case. In regard to the objection of alternative remedy by way of revision as provided under the provisions of the Chhattisgarh Panchayats (Appeal And Revision) Rules, 1995 (hereinafter referred to as 'the Rules, 1995'), learned counsel would submit that the substantial provisions of Section 21 (4) of the Adhiniyam, 1993 clearly provides that decision of the Collector shall be final. Thus, any alternative and statutory remedy of appeal or revision as provided under the Rules, 1995 framed in exercise of its power conferred by Section 95(1) read with Section 91 of the Adhiniyam cannot override the substantial provision of the Adhiniyam, 1993.
7. Per contra, Shri P. Diwakar, learned Senior Advocate with Shri R.S. Patel, learned Advocate appearing for the respondent No. 6 would submit that the petition has become infructuous as the prayer sought for cannot be granted as the order of recounting has already been complied with. The petitioner has not challenged the impugned order dated 8.1.2007 passed by the Collector, while questioning the legality and validity of the order directing the S.D.O. for recounting of votes. There is inherent discretionary

power vests in the Collector to grant interim relief during pendency of the dispute. The writ petition is not maintainable as alternative remedy of the revision under Rule 5 of the Rules, 1995 is available. The remedy is efficacious and the same cannot be given a go-by.

8. From the pleadings and submissions made by the parties, following questions arise for consideration:

- i) Whether the Collector, in exercise of its power under Section 21 (4) of the Adhiniyam, 1993 is competent to direct the Prescribed Authority to recount votes polled in no confidence motion?
- ii) Whether the relief for stay of recounting of votes which was done pursuant to the order dated 08.01.2007 passed by the respondent No. 2, can be granted, without impugning the order dated 08.01.2007?
- iii) Whether this petition under Article 226 of the Constitution is maintainable when a revision under Rule 5 of Rules, 1995 against the order dated 08.01.2007 passed by the respondent No. 2 is available?

9. A dispute with regard to counting of votes in the no-confidence motion against respondent No. 6, held on 28.11.2006 was referred by the Sarpanch (Respondent No. 6) to the Collector under provisions of section 21(4) of the Adhiniyam, 1993. The respondent No. 6 filed an application for stay of the subsequent action pursuant to no confidence motion dated 28.11.2006. The Collector granted stay of the subsequent action pursuant to the no confidence motion dated 28.11.2007 (Annexure P/4). The case of the respondent No. 6, before the Collector was that the counting of votes was not properly done. The requirement was to put '✓' or 'X' marks in the voting slip with red ink. In some of the voting slips, '✓' mark was on the back of the slip and in some of the voting slips, red ink was not used and 'X' was marked at the back of the slip. The Collector, after having

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considered the facts and after examining the papers, came to the conclusion that counting of votes in the no-confidence motion dated 28.11.2006 against the respondent No. 6 was not properly done. It was further contended by the learned counsel for the petitioner that once no-confidence motion has been carried out, the same comes into effect immediately. Thus, the subsequent counting of votes cannot be ordered. The Collector, after having held that the counting was not done properly, directed the prescribed officer the Sub Divisional Officer to conduct recounting of votes polled in the no-confidence motion dated 28.11.2006 and take appropriate action. The prescription under sub-section (1) of Section 21, of the Adhiniyam, 1993 that once "no confidence motion" is carried out against a Sarpanch or Up-Sarpanch, as the case may be, is not a limitation on the power of the District Collector to pass appropriate interim order when a reference envisaged under Section 21(4) of the Adhiniyam is made by the Sarpanch or Up-Sarpanch as the case may be for his decision. (See Smt. Basanti Chandra & Others Vs. Nand Ram & Others 2006 (1) C.G.L.J. 486)

9. The contention of the learned counsel for the petitioner that the Collector ought to have exercised the power of direction for recounting of votes only after full trial deserves to be rejected. The power of the Collector under Section 21(4) of the Adhiniyam, 1993 confines to adjudication of the dispute referred to him. The Collector has adjudicated the dispute by coming to the conclusion that the counting of votes polled in the no-confidence motion was not proper. Thus, it was necessary for him to direct the competent authority for recounting of votes and to take appropriate action. The contention of the learned counsel that it amounts to abdication of power is without any basis as the Collector has adjudicated the dispute after considering all the facts and hearing learned counsel for the petitioner, before directing the competent authority to recount votes polled

in the no-confidence motion. This was not a case of delegation of power by the Collector to be exercised under section 21(4) of the Adhiniyam, 1993 but it was the case wherein the Collector has adjudicated the dispute under section 21(4) of the Adhiniyam, 1993 and made direction after having satisfied himself that in the facts of the case, it was necessary to recount votes, directed recounting of votes.

11. It is well settled principle of law that if the powers are strictly circumscribed by the very statutory provisions which conferred upon it those powers and the same could be exercised in the manner provided therefor and subject to such conditions and limitation stipulated by very provision of law under which the competent authority itself has been created. (See *Prakash H. Jain Vs. Marie Fernandes (Ms)* (2003) 8 SCC 431). In the instant case, the power of the Collector under section 21(4) of the Adhiniyam, 1993 has not been circumscribed by any provision. Thus, the Collector is competent to exercise his power by granting interim relief before proper adjudication of the dispute pending before him. As held (supra) that the Collector has not delegated his power exercisable under section 24(1) of the Adhiniyam, 1993, the decision of *Bombay Municipal Corporation v. Dhondu Narayan Choudhary* (AIR 1965 SC 1486), and *Skypak Couriers Ltd. Vs. Tata Chemicals Ltd.* (2000) 5 SCC 294, relied on by the learned counsel for the petitioner is not applicable to the facts of the present case.
12. In regard to counting of votes in no-confidence motion, where total 15 members were present and 12 members voted in favour of no-confidence motion, recounting for two votes become very important as even change in the nature of two votes changes the result completely. On recounting, it was found that three votes were invalid, two votes were cast against no-confidence motion and 10 votes were cast in favour of the no-confidence motion. The requirement under section 21(1) of the Adhiniyam, 1993 is

that if more than three-fourth members present and voting in favour of no-confidence motion, the no-confidence motion is carried out. The earlier 12 members were held to have cast their votes in favour of no-confidence motion and two votes were polled against the no-confidence motion and one was rejected. In the event, 12 votes were cast in favour of the no-confidence motion, no confidence motion was held to be carried out. But if 10 votes are cast in favour of no-confidence motion, it is not three-fourth of the total members present and thus, no confidence motion is not carried out. Thus, it cannot be held that recounting of votes was ordered on mere asking without making out a case for recounting.

13. With regard to availability of alternative remedy by filing revision against the order dated 8.1.2007 passed by the Collector, it is not necessary to go in detail as to whether alternative remedy of filing revision under Rule 5 of Rules, 1995 was available or not as it is trite law that availability of alternative remedy is not an absolute bar for maintainability of a writ petition.
14. The matter has been heard at length. Therefore, at this stage, examining the availability of alternative remedy would not serve any purpose. The petitioner has not impugned the order dated 8.01.2007 pursuant to which the order of recounting by the competent officer was ordered. The petitioner has sought for stay of recounting pursuant to the order dated 8.1.2007.
15. The learned counsel appearing for the respondents submit that the relief sought for by the petitioner cannot be granted as the order dated 8.1.2007 has attained finality for want of challenge to the said order.
16. Be that as it may. Since I have examined the order dated 8.1.2007 from all angles, at this stage, it is not necessary to go into the question as to

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whether this petition is maintainable or not in absence of challenge to the order dated 8.1.2007.

17. As a result and for the reasons aforementioned, this petition is dismissed. However, in the facts and circumstances of the case, there shall be no order as to costs.

Sd/-
Satish K. Agnihotri
Judge